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No. 791

IN THE

Supreme Court of the United States

October term, 1963

FRANK CICKELLI,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Ohio entered on June 19, 1963, dismissing an appeal as of right and overruling a motion to require the Court of Appeals to certify its record. Appellant's motion for rehearing was overruled by the Supreme Court of Ohio on September 25, 1963. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The only opinion written below, that of the Court of Appeals for the Seventh Ohio Appellate District, is reported at 92 Abstract 338 (The Ohio Bar, Vol. XXXVI, No. 47, December 9, 1963), a copy of which is appended hereto as Appendix B.

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review this decision on appeal is conferred by Title 28, United States Code, Section 1257(2).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(A) Where a Grand Jury is selected and qualified in a manner contrary to that prescribed by law, and where such Grand Jury returns a secret indictment against a defendant who had no prior knowledge of investigation by that Grand Jury, is not such defendant deprived of the due process of law guaranteed him by the 14th Amendment to the Constitution of the United States by the overruling of a motion to dismiss the indictment made prior to arraignment?

(B) Where a state statute makes it a crime for a public official to solicit *or* accept a bribe, does not the soliciting *and* accepting of a bribe constitute but one offense; and where a defendant is tried and convicted under one count for aiding and abetting in the soliciting of a bribe and under another for obtaining money under false pretenses, where the uncontroverted testimony offered by the State shows that the only money received was that which had been solicited, is not such defendant twice placed in jeopardy for a single offense, contrary to the 5th Amendment to the Constitution of the United States?

(C) Where a state statute provides that "the court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury," is not a defendant deprived of the due process of law guaranteed him by the 14th Amendment to the Constitution of the United States when a trial judge, after instructing the jury for one hour, interrupts his charge for an overnight recess,

and, upon resuming the next morning, only amends certain instructions given the day before in regard to some of the elements of the crime involved?

STATUTES INVOLVED

Sections 2313.06, 2313.08, 2313.10, 2313.12, 2313.13, 2313.15, 2313.41, 2907.21, 2917.01, and 2945.10, Revised Code of Ohio, are set forth in Appendix A hereto.

STATEMENT

The following chronological sequence, as revealed by the records of the Court of Common Pleas for Trumbull County, Ohio, leading to the conviction of the appellant is essential to the appreciation of the substance of the questions raised by this appeal:

October 13, 1961. Indictment filed and capias issued charging appellant with five counts: (N.B. Appellant was in custody at the time the Grand Jury was convened or the indictment returned)

(1) Aiding and abetting a councilman of the City of Warren in the soliciting of money to influence the vote of said councilman on a matter legally to come before him, contrary to Section 2917.01, Revised Code of Ohio;

(2) In conspiracy with another, threatening to kill with intent thereby to extort money, contrary to Section 2901.32, Revised Code of Ohio;

(3) In conspiracy with another, threatening to kill with intent thereby to extort money, contrary to Section 2901.32, Revised Code of Ohio;

(4) In conspiracy with another, unlawfully obtaining possession of property of another by false representations, contrary to Section 2907.21, Revised Code of Ohio;

(5) Dismissed by the court prior to trial.

October 17, 1961. Appellant arraigned. Plea of not guilty entered. Leave taken to move or demurrer to indictment.

October 20, 1961. Demurrer to indictment filed.

October 20, 1961. Motion of appellant for Bill of Particulars.

October 26, 1961. Demurrer to indictment overruled.

December 6, 1961. Motion for change of venue filed by appellant.

December 7, 1961. Bill of Particulars filed.

December 8, 1961. Motion of Prosecuting Attorney to amend indictment.

December 8, 1961. Leave to amend indictment granted and amended indictment filed.

December 13, 1961. Opinion filed denying motion for change of venue.

January 8, 1962. Motion to dismiss indictment filed.

It should be noted at this point, that while a motion for change of venue was pending, the Prosecuting Attorney took leave to, and did, file an amended indictment. *The appellant was never arraigned on this amended indictment.* The next pleading filed was the appellant's motion to dismiss the indictment. *This could only have been directed to the amended indictment on which the appellant had never been arraigned.*[1]

The motion to dismiss the indictment was predicated on a failure to comply with the statutes of the state of Ohio relative to the selection and qualification of Grand Jurors and was timely filed following the filing of the amended indictment. *The question of the propriety of the indict-*

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1. The writer of this statement was not trial counsel. Present counsel became aware of the fact that appellant had not been arraigned only during preparation of the appeal of this case to the Supreme Court of Ohio.

ment was thus raised at the earliest possible time following the filing of the amended indictment.

In the memorandum accompanying the motion to dismiss the indictment, citation was made to a ruling of the Court of Common Pleas for Trumbull County in Case No. 11628 where the court sustained a challenge to the array of jurors. This motion is appended hereto as Appendix C.

Case No. 11628 was the case of the *State of Ohio v. Raymond Little*. Raymond Little is the councilman whom the appellant is charged with aiding and abetting. The same jury returned indictments against both Little and appellant. *The judge who overruled the appellant's motion to dismiss the indictment is the same judge who less than two months earlier sustained a motion in the principal's, Little, case discharging a jury for the same reasons contended for by appellant in his motion to dismiss.*

The motion challenging the jury in the *Little case* recited violations of Sections 2313.06, 2313.08, 2313.10, 2313.12, 2313.13, and 2313.15 of the Revised Code of Ohio, all of which are set out in full in Appendix A hereto.

The entry of the court ruling on this motion reads, in part, as follows:

> "This matter coming on to be heard upon the motion filed by the defendant in this case, challenging the array of jurors * * * and it being made to appear that said challenge should be sustained.
> "It is by the court ordered and decreed that said array of jurors be, and the same is hereby set aside."

Upon a trial to jury, the appellant was found guilty on counts one and four of the indictment and not guilty of counts two and three, the fifth count having been dismissed by the court prior to trial.

THE QUESTIONS ARE SUBSTANTIAL

(A) Section 2313.41, Revised Code of Ohio, provides, in substance, that a challenge to a grand jury array may be made when the jury was not selected, drawn or summoned as prescribed by law. The decision of the Ohio Court of Appeals, in affirming the overruling of a motion to dismiss the indictment, is in conflict with the decisions of this Court. The opinion of the Court of Appeals recites that appellant's motion to dismiss was not timely made.

As pointed out in the preceding section hereof, the first pleading filed by the appellant after the amendment of the indictment was the motion to dismiss the indictment. Since appellant was never re-arraigned after the amendment of the indictment, *this motion to dismiss was made prior to arraignment.*

The motion to dismiss thus brings the case clearly within the rules announced by this Court. This Court held in *United States v. Gale*, 109 U.S. 65, that an objection to the qualification of grand jurors, or to the mode of summoning or impanelling them, must be made by a motion to quash, or by a plea in abatement, before pleading in bar.

The objection raised in *Gale* was that the court, in excluding certain persons from jury service, relied on a Florida statute claimed to be unconstitutional. This Court held that the objection could not be raised after trial and conviction on a plea of not guilty.

Mr. Justice Bradley, however, in delivering the opinion of the Court, set out certain instances in which a different rule should obtain. He said, in part:

> "There are cases, undoubtedly, which admit of a different consideration, and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the panel is void:

> * * * or where some other fundamental requisite has not been complied with.
> "* * *
> "Mr. Wharton, in his section on the 'Disqualification of Grand Jurors, and how it may be excepted to,' * * * then adds:
> "'Ordinarily after the general issue has been pleaded objections are too late; and when the objection goes to the manner of drawing it should be taken by challenge to the array. . . . But on principle, in those cases in which the defendant is surprised, and had no opportunity to take exception until after the finding of the bill, he should be allowed to take advantage of any irregularity by plea.'
> "We apprehend that the rule last stated is the correct one."

More recently, in *Reece v. Georgia*, 350 U.S. 85, this Court held that where no opportunity to challenge the grand-jury selection has been afforded a defendant his right may be asserted by a plea in abatement or a motion to quash before arraignment and failure to consider the motion on its merits is a denial of due process of law and violates the 14th Amendment.

Valid grand-jury selection is a constitutionally protected right, and has been so protected by this Court for nearly 60 years. *Reece v. Georgia*, 350 U.S. 85, 87. Selection of a grand jury in a manner contrary to the mandatory requirements of law requires the sustaining of a motion to dismiss the indictment. *United States v. Hoffa*, 196 F. Supp. 25, 28. That the requirements for the selection of grand jurors are mandatory ones in Ohio is amply recognized by the Supreme Court of Ohio in *Cleveland Railway Company v. Brescia*, 100 Ohio St., 267, at page 270, where the court says:

> "The Legislature in the wording of these two sections used the verb 'shall' nineteen times, and the language is as mandatory as it could select, and it specifically required of the commission that it exercise its judg

ment as to the competency of each person selected. To hold that the selection of a jury, as this jury was selected, is a substantial compliance with the law is to nullify its every provision, for if the commission can ignore as many of its essential provisions as it here ignored, it can ignore them all and inaugurate a system all its own."

Requiring a defendant to go to trial on an indictment returned by a grand jury selected in a manner contrary to mandatory provisions of the law raises a substantial question of due process which should be given plenary consideration by this Court after full opportunity for briefs and oral argument.

But, assuming, for the sake of argument, that the indictment was properly returned, the lack of a plea to the indictment, irrespective of what recitals there may be in the record concerning trial procedures, is a matter of substance involving substantial rights of an accused and *due process requires the entering of a plea before a trial can rightfully proceed. Crain v. United States*, 162 U.S. 625, and cases cited therein.

(B) Section 2917.01, Revised Code of Ohio, provides, in part, that no "officer shall solicit or accept any valuable or beneficial thing to influence him with respect to his official duty."

The appellant herein was indicted as an aider and abettor under this section. He was also indicted in a separate count for, in conspiracy with another, obtaining money under false pretenses.

The only evidence offered by the State on either count was that of one Rocco Ferrera, the person from whom the solicitation was alleged to have been made and from whom money was alleged to have been obtained under false pretenses.

The following is Mr. Ferrara's testimony on both counts:

"Q. And on your part, you were to pay what? A. We were to pay $35,000.

"Q. Was there any discussion as to whom this money would be paid? A. It was to be paid to Frank Cickelli.

"Q. In Frank Cickelli's basement, are you referring to? A. Yes, on May 7th.

"Q. Tell us what that discussion was? A. I asked Frank Cickelli why I had to give the money to Paul LaMonge. We had agreed on May 7th in his basement in the presence of Raymond Little that they were both to get the money.

"Q. At any time prior to this meeting, had anything ever been done with respect to the payment of money which had been discussed, payment of money to Mr. LaMonge, or Mr. Little or Mr. Cickelli? A. Yes.

"Q. What had been done in that regard? A. I had given Paul LaMonge five thousand dollars which constitutes part payment.

"Q. Part payment of what? A. Of the $35,000."

There is thus no question from the above testimony that the only money, if any, paid to anyone was the same money that had been solicited. There was, therefore, assuming the evidence of the State to be completely credible, a solicitation *and* an acceptance of money designed to influence a public official with respect to his official duty.

Do the solicitation *and* the acceptance constitute one crime or two?

This question has been considered by this Court on at least two occasions. In *Connors v. United States*, 158 U.S. 408, 411, this Court, in construing a statute similarly setting up in the disjunctive several prohibited acts, said that if the accused did all three of the acts prohibited by the statute he was guilty of the crime and the verdict of guilty

had reference to that crime "whether committed *in one or the other of the modes specified* in the indictment." (emphasis added)

The exact question raised herein was specifically raised and decided by this Court in *Crain v. United States*, 162 U.S. 625. The statute considered in *Crain* listed several prohibited acts in the disjunctive. The statute, said this Court, was directed against certain defined modes for accomplishing a general object.

So the Ohio statute, Section 2917.01, Revised Code of Ohio, is directed against the corruption of public officials and against certain defined modes for accomplishing such corruption. To permit a defendant to be convicted for an alleged violation of two acts recited, in the disjunctive, to constitute one crime is to place that defendant in jeopardy twice for one violation.

Bishop, in his New Criminal Procedure, Vol. 1, Sec. 436, succinctly states the point as follows:

> "A statute often makes punishable the doing of one thing or another, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once, and incurs only one penalty."

Approval of this statement from Bishop is recognized in *State v. Connor*, 30 Ohio St., 405; *Hale v. State*, 58 Ohio St., 676; *State v. Schultz*, 96 Ohio St., 114; *People v. Gibson*, 191 N.Y. 227; and *People v. Bunkers*, 2 Cal. App. 197.

The latter two cases specifically dealt with statutes making it a crime to "ask, receive or agree to receive" a bribe and to "ask for or offer to receive" a bribe.

In *Gibson*, the court, although not finding it necessary to decide the point, said that it did not think the section should be so construed as to mean that a person might be punished

for receiving a bribe *and also* separately and independently for asking, *and also* for agreeing to receive the same bribe, but that these separate acts, when forming a connected series relative to the same subject matter, should be regarded as constituting but *a single crime*.

In *Bunkers*, the court said:

> "The appellant was guilty of a crime when he asked for *or* offered to receive the bribe, and his acceptance of it neither added to his guilt nor to the penalty already entailed."

The California court carefully summed up what it called a "well-settled rule" that where a statute enumerates a series of acts either of which *separately, or all together*, may constitute *the offense*, all of such acts may be charged in a single count, for the reason that, notwithstanding each act may itself constitute the offense, *all of them together do no more*, and likewise *constitute one and the same offense*.

The appellant herein was convicted and sentenced for aiding and abetting in the solicitation of a bribe and convicted and sentenced separately for accepting that which he is alleged to have solicited. The statute recites only one crime—to solicit *or* accept. He has thus been tried and convicted twice for a single offense.

(C) Section 2945.10, Revised Code of Ohio, provides in part as follows:

> "The trial of an issue upon an indictment or information shall proceed before the trial court or jury as follows:
>
> "* * *
>
> "(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury."

As will be shown more fully when opportunity is provided to present the record in this case, the trial judge, at the conclusion of the arguments of counsel, proceeded to charge

the jury on the questions of law raised by the indictment and the evidence. After more than one hour of instruction (nearly twenty pages of the Bill of Exceptions, R. p. 576) the trial judge said:

> "Now Ladies and Gentlemen, the time for our adjournment has arrived. I have talked to you for some extended length of time in the hope that I have been able to explain to you the matters of law covering the evidence which has been presented to you. I do not like to send you out to consider these matters at this late hour in the afternoon, and I am proposing to adjourn before I have completed this charge, and complete the charge of law tomorrow morning before you go out to commence your deliberations."

Thereupon the court was adjourned and reconvened at 9:00 the next morning. Upon reconvening, the court stated that he wanted to correct some of the statements he had made the day before concerning the law of conspiracy. He thereupon redefined some of the elements of conspiracy, and submitted the case to the jury.

The second, third and fourth counts of the indictment alleged conspiracy. Although appellant was acquitted on the second and third counts, he was convicted on the fourth count of conspiracy. It is impossible, of course, to know to what extent the jury was influenced by the later amendatory remarks of the trial judge so far as the conspiracy element of the fourth count is concerned.

There are many definitions of the word "forthwith" which appear in many dictionaries and decisions. Definitions such as "with dispatch," "without delay," and "immediately" are legion. None of them, however, have been applied to a statute which provides that a "court shall forthwith charge the jury."

Courts have passed on the question of whether a court may take a recess, even an overnight recess, between the

arguments and the charge. And generally, so long as the court conducts no other business in the interim, such a recess is not prejudicial to a litigant. See *Kahoun v. State*, 33 Ohio App. 1; *Balzhiser v. State*, 35 Ohio Law Reporter 120.

But what of the interruption of a charge, once begun, by an overnight adjournment? Can it be said, in view of the due process guarantees of our Constitution, that it is not prejudicial to permit a court to fully charge upon the elements of a crime, adjourn for overnight, reconvene and upon reconvening re-emphasize, by re-defining, certain elements of the crime involved immediately before submitting the case to the jury?

It does not require an overactive imagination to conjure the effect on a jury of the concluding remarks made to it by a trial judge. The effect of permitting a court to recess during its instructions and upon reconvening to re-emphasize certain elements of the crime can only result in the negation of the rights guaranteed by the due process clause of the Constitution and, in effect, become a denial of due process. To permit a court to thus emphasize certain aspects of the case is the equivalent of argument by the court for a particular position.

It is submitted that the decisions of the courts of Ohio fail to recognize the rights guaranteed to the appellant by the 5th and 14th Amendments to the Constitution of the United States, that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Counsel for Appellant.

APPENDIX "A"

Section 2313.06, Revised Code of Ohio
Poll lists.

On or before the last day of December, in each odd-numbered year, unless otherwise ordered by the court of common pleas, the board of elections for each county shall make and file with the commissioners of jurors a certified list containing the names and addresses of all the electors of the county shown on either the pollbooks or registration lists for the next preceding general election.

Section 2313.08, Revised Code of Ohio
Annual jury list.

The jury year in each county shall begin on the first Monday of August of each year, provided the court of common pleas may designate otherwise. A new and complete jury list shall be made up annually by the commissioners of jurors and shall be certified by them and filed in their office before the beginning of each jury year. The said names shall be entered in a suitable book or record, to be known as the "annual jury list," and shall be arranged alphabetically so far as practicable and under convenient divisions by precincts, districts, and townships, and shall be properly indexed. With each name shall be recorded the occupation, place of business, and place of residence, as nearly as the same can be ascertained. A duplicate of said annual jury list shall be certified by the commissioners and filed in the office of the clerk of the court of common pleas, and the commissioners may, by order of the court, add to said list, or enter on a supplementary list, the names of persons, their occupations, place of business, and place of residence, who shall thereafter be discovered to be qualified to serve as jurors.

In the selection of the names for said compiled list, unless otherwise ordered by the court, the commissioners shall proceed to assign a consecutive number to each name upon said list of electors, starting with one, and shall use, for the purpose of compiling said list of prospective jurors, a key number which shall be designated by the court. Said commissioners shall proceed to select from said list of electors the name of each person accordingly as the key number so designated, or the multiples thereof, appear opposite said names on said list, until a sufficient number of such names are selected to make up the required number of prospective jurors.

Section 2313.10, Revised Code of Ohio
Notice to appear and testify before commissioners; purpose of testimony.

The commissioners of jurors may serve personally or by mail on any person within the county, a notice requiring him to attend before a commissioner at a specified time, not less than five days after service of the notice, for the purpose of testifying concerning his own qualifications or liability, or those of any other person, to serve as a juror. A person so notified must attend and testify accordingly.

Section 2313.12, Revised Code of Ohio
Exemptions of jurors; proof of exemption; certificate of exemption; record.

The exemptions of jurors shall be such as are prescribed by sections 2313.01 to 2313.46, inclusive, of the Revised Code, and the general statutes of the state. The commissioners of jurors alone shall decide upon their qualifications and exemptions up until the time of notice for service, except as otherwise expressly provided in such sections; but the court may review and decide upon their qualifications

and exemptions upon a written application and satisfactory legal proof at any time after they are notified and attend. The commissioners, upon request, shall issue to a person entitled to an exemption a certificate of that fact, which shall exempt the person to whom it is granted from jury duty during the time specified therein. Said commissioners shall keep a record of all proceedings before them or in their office, and of all persons exempted and the time and reasons for such exemptions.

Section 2313.13, Revised Code of Ohio
Service of juror may be postponed; temporary excuse or discharge.

The court of common pleas may postpone the whole or a part of the time of service of a juror, after notice for service, to a later date during the same or a subsequent term of the same jury year or may excuse a juror, after notice for service, from service at that term for not more than three days at a time, where the exigencies of his business require his temporary excuse. The court may also discharge for the term, or excuse until a day certain, one or more jurors so notified and attending, whose further attendance is not required for the trial of issues at that term, or until that day. Each juror so excused or whose time of service is postponed until a day certain must attend at the opening of court on that day, and thereafter until he is discharged, without further notice.

Section 2313.15, Revised Code of Ohio
Report of names of jurors excused to subsequent term.

The commissioners of jurors shall report the names of all jurors excused to a subsequent term as provided in

section 2313.13 of the Revised Code, to the officers attending the drawing of the jurors for that term, and each such name shall be placed upon the list of jurors drawn as provided by sections 2313.01 to 2313.46, inclusive, of the Revised Code. Such juror shall be made one of the total number directed to be drawn for that term, and no more names shall be drawn from the jury wheel than are sufficient to make up the number ordered by adding the names of the jurors so excused to the names then drawn.

Section 2313.41, Revised Code of Ohio
Array may be set aside.

A challenge to the array may be made and the whole array set aside by the court when the jury, grand or petit, was not selected, drawn, or summoned, or when the officer who executed the venire did not proceed as prescribed by law. No challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror; but no challenge, a juror may be set aside by reason of a misnomer in his name; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors.

Section 2907.21, Revised Code of Ohio
Larceny by trick.

No person shall obtain possession of, or title to, anything of value with the consent of the person from whom he obtained it, provided he induced such consent by false or fraudulent representation, pretense, token, or writing.

Whoever violates this section is guilty of larceny by trick, and, if the value of the thing so obtained is sixty dollars or more, shall be imprisoned not less than one nor more than seven years. If the value is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both.

Section 2917.01, Revised Code of Ohio
Bribery.

No person shall corruptly give, promise, or offer to a member or officer of the general assembly or to a state, judicial, or other officer, public trustee, or an agent or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment, or employment, any valuable thing, or corruptly offer or promise to do any act beneficial to such person to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him. No member of the general assembly, or a state officer or other officer, public trustee, agent, or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, shall solicit or accept any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him.

Whoever violates this section shall be imprisoned not less than one nor more than ten years.

A person convicted under this section is disqualified from holding any public office or appointment under this state, and if not a state officer, shall be removed from office or employment by order of the court.

Section 2945.10, Revised Code of Ohio
Order of proceedings of trial.

The trial of an issue upon an indictment or information shall proceed before the trial court or jury as follows:

* * *

(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or other charge or instruction provided for in this section, when so written and given, shall not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

The court may deviate from the order of proceedings listed in this section.

APPENDIX "B"

STATE OF OHIO, TRUMBULL COUNTY IN THE COURT OF APPEALS OF THE SEVENTH DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

vs.

FRANK CICKELLI,
Defendant-Appellant.

OPINION

[Dated: November 7, 1962]

COLLIER, J.

On October 13, 1961, the defendant in the Court of Common Pleas of Trumbull County, Frank Cickelli, appellant herein, was indicted by the Grand Jury of said county on five separate counts:—

(1) Aiding and abetting a bribery solicitation by a public official in violation of Ohio Revised Code, Section 2917.01.

(2) In conspiracy with another, threatening to kill Eugene Brady with intent to extort money, contrary to Section 2901.32 of the Ohio Revised Code.

(3) In conspiracy with another, threatening to kill Al Cicchini with intent to extort money, contrary to Section 2901.32 of the Ohio Revised Code.

(4) Obtaining money by false pretenses, contrary to Section 2907.21 of the Ohio Revised Code.

(5) Corruptly attempting to influence a witness in the discharge of his duties as a witness, contrary to Section 2917.07 of the Ohio Revised Code.

On January 15, 1962, trial by jury was begun and at the conclusion of the State's case, on motion of the defendant, the fifth count of the indictment was dismissed. The other four counts of the indictment were submitted to the jury and on January 24, 1962, the defendant was found guilty of counts 1 and 4 and not guilty of counts 2 and 3. Defendant's motion for a new trial was overruled, and sentence to the Ohio Penitentiary was imposed. From this judgment the defendant has perfected his appeal on questions of law to this court.

The assignments of error are:—

1. Defendant was deprived of his rights under the Constitution of the State of Ohio and the Constitution of the United States of America by the court's overruling defendant's motion to dismiss the indictment against defendant for the reason that the panel of persons drawn to serve as Grand Jurors was not selected according to law and was improperly drawn.
2. The verdict of the jury is contrary to law and against the manifest weight of the evidence.
3. The court erred in its charge to the jury.
4. The court erred in permitting the introduction by the state of evidence of conversation between witnesses and third parties at which defendant was not present, when no proper foundation had been laid and there was no proof of conspiracy.
5. Error of the court in continuing his charge to the jury contrary to prior agreement between counsel and the court.
6. Error of the court in conducting secret conferences with the prosecuting attorney and his associates at two separate times during the course of the trial.
7. In indicting defendant on two counts arising out of the same subject matter or same transaction is a violation of defendant's rights under the Constitution of the State of Ohio and the Constitution of the United States of America, not to be twice put in jeopardy for the same offense and the court erred in sentencing defendant on more than one count in the indictment.

The alleged errors will be considered in the order stated in defendant's brief. Under assignment of error No. 1, the defendant contends that he was deprived of his constitutional rights for the reason the members of the Grand Jury which returned the indictment against him were not selected and drawn according to law. On October 17, 1961, the defendant was arraigned, entered a plea of not guilty, and requested leave to file motions by October 20, 1961, which was granted. On that date the defendant filed a motion for a bill of particulars and a demurrer to the indictment with no reference to this alleged error. On January 8, 1962, the defendant filed a motion to dismiss the indictment, contending in his memorandum in support of the motion that the Grand Jury had been improperly selected and drawn. Defendant offered no evidence in support of his motion and the record is silent throughout the entire proceedings in this case on this question. In other words, the record contains no evidence showing how the persons constituting the Grand Jury were selected and drawn. The decision of a reviewing court must be based upon the evidence before the trial court and in the absence of affirmative proof of the alleged error, the presumption of regularity prevails. In an appeal on questions of law a reviewing court is bound by the record and may not consider any facts extraneous to the bill of exceptions regardless of how such facts may be brought to the attention of the court. See 3 Ohio Jur. (2d) 266, Section 359; In Re: Estate of Gardner, 112 Ohio App. 462; Allison v. Watkins, 78 Ohio Law Abstract 60; Tarpoff v. Board of Liquor Control, 83 Ohio Law Abstract 64. For this reason alone the first assignment of error must be overruled, although in our opinion Section 2313.41, Revised Code, applies to the situation and, had the defendant properly challenged the array or filed a plea in abatement

to the indictment, the same would not have been well taken for the reason this statute provides:—

> "* * * and no indictment shall be quashed or verdict set aside for any such irregularity, (jurors not selected, drawn or summoned as prescribed by law) if the jurors who formed the same possessed the requisite qualifications to act as jurors."

Defendant makes no claim that any of the jurors constituting the Grand Jury were disqualified to act as members of the Grand Jury.

In considering the second assignment of error which involves the weight and sufficiency of the evidence, we must necessarily review the evidence. We are concerned only with the evidence as it pertains to the counts one and four, count number five having been dismissed and a verdict of not guilty having been returned on counts two and three. The following is a brief statement of the background leading up to the facts on which this indictment was based. In May, 1960, the City of Warren, Ohio, passed an ordinance authorizing the advertisement for bids on a sewer improvement project, the cost of which exceeded four million dollars. After rejecting bids received on August 1, 1960, and October 7, 1960, bids were received for the third time on March 16, 1961, and on May 5, 1961, the City Council passed an ordinance authorizing the Board of Control, consisting of the Mayor and the Safety Service Director of the City of Warren, to enter into a contract with the Rocco Ferrera Company and the Boam Construction Company, these two companies having filed a bid on phases B and C of the project. These two companies are referred to in the record as the Ferrera-Boam Companies. Rocco Ferrera was president and Al Cicchini was vice president of the Ferrera Construction Company and Pat Brady was presi-

dent and Eugene Brady was Secretary and Treasurer of the Boam Company. Although the bids of the Ferrera-Boam Companies had been accepted as the lowest and best bids, the necessary ordinance authorizing the financing of the project had not yet been passed by the City Council and the contract between the City of Warren and the Ferrera-Boam Companies could not be signed until such financing ordinance was adopted. Such ordinance was later passed by the City Council and on July 6, 1961, the contract between the City and the contracting companies was signed.

It is contended by the State that in order to procure such financing legislation by the City Council, the criminal acts alleged in the indictment in this cause were committed by the defendant. Count No. 1 of the indictment, in substance, charges that the defendant, either on April 30, 1961, or May 7, 1961, acted in conjunction as an aider and abettor of Raymond Little, a duly elected councilman of the City of Warren, to unlawfully solicit from Rocco Ferrera, Eugene Brady and Al Cicchini thirty-five thousand dollars to influence the said Raymond Little's vote as such councilman to authorize the financing of said sewerage improvement and to award the contract to the Ferrera-Boam Companies for construction of the sewer improvements, in violation of Section 2917.01, Revised Code of Ohio.

The record is long and complicated and we shall not attempt to analyze the evidence in detail. The principal witnesses for the State were Rocco Ferrera, Al Cicchini and Eugene Brady, officers of the Ferrera-Boam Construction Companies. The record shows that these officers of the Ferrera-Boam Construction Companies had several secret meetings with Raymond Little, Jack Flask and John Janosik, three councilmen of the City of Warren, for the purpose of determining how these three councilmen could

receive illegal benefits for themselves to facilitate the awarding of the contract to the Ferrera-Boam Companies; that various ways and means to accomplish this purpose were discussed at these meetings, such as direct payments to the councilmen by the contractors, fictitious "extras" and commission on materials, but no definite agreement had been reached as to the amount of the illegal payments to the councilmen or the illegal method to be followed. In April, 1961, the officers of the construction company were contacted by one Louis Massacci, a resident of Warren, who suggested that these company officials meet with the defendant, Frank Cickelli, who was the County Democratic Party Chairman. On April 21, 1961, there was a meeting between Eugene Brady, Rocco Ferrera and the defendant at a restaurant in Cleveland. This meeting was followed by another meeting on May 7, 1961, in the basement of defendant's home in Warren, Ohio, with Rocco Ferrera, Al Cicchini, Eugene Brady, Raymond Little, councilman, and the defendant, Frank Cickelli, present. The defendant called Mr. Little by phone after the others had arrived at his home. It is undisputed that the purpose of the meeting was to effect an agreement between the officers of the construction companies, Rocco Ferrera, Al Cicchini, Eugene Brady and Councilman Little on the amount and methods of payments by these company officers to Little necessary to have the contract awarded to their companies. The three prosecution witnesses testified that the first amount demanded by Little was $150,000.00; that the defendant participated in the conversation and finally it was agreed that the contractors would pay the sum of $35,000.00 to Little and Frank Cickelli, the defendant, the payments to be made to them in the basement of defendant's home when they both were present so that each party would know that

the money was paid. The evidence further shows that the officers of the contracting companies made two payments of $5,000.00 each to one Paul Lamonge, who was designated by the defendant to receive the payments instead of Mr. Little, as first agreed upon.

The following testimony of Al Cicchini, in our opinion, if believed by the jury, was amply sufficient to establish the guilt of Raymond Little as the principal and the defendant, Frank Cickelli, as an aider and abettor in the solicitation of a bribe, as charged in the first count of the indictment:—

> "Q. Would you tell us what discussion, what conversation took place there? A. Well, Frank Cickelli asked Ray Little what would he take to make you people happy, that's how much money—that is how much money do they want, what could you settle for. Ray Little asked for one hundred and fifty thousand dollars and I believe it was Mr. Ferrera said 'No, we can't do it, it's too much, just forget the whole thing, if we are going to pay that kind of money it's impossible.' So Frank Cickelli says let's not try to slaughter these people or hang these people. I'm in business myself I know about taxes, they can't possibly pay that kind of money, let's talk this thing over some more and so we did, they came down to one hundred thousand and then to seventy-five and we argued back and forth a little bit, finally Frank says how much are you willing to pay. And I believe Rocco Ferrera said twenty-five thousand dollars, and Ray Little says 'no that will never do, that will never satisfy my people'. Frank Cickelli says 'yes, you are going to have to do a little better than that,' so they finally agreed on thirty-five thousand dollars.
>
> "Q. Was there a discussion as to how the money was to be paid, who the money was to be paid to? A. Yes sir, there was.
>
> "Q. What was that? A. Well it seems that Frank Cickelli and Ray Little had not been getting along very well in the past, and they both said that they didn't trust each other and that payment was to be made in

Frank Cickelli's basement with both Ray Little and Frank Cickelli present to see that each party would know that the money was paid."

The fourth count of the indictment, in substance, charges that Frank Cickelli on or about August 21 or August 22nd, 1961, in conspiracy with one Paul Lamonge, did unlawfully obtain possession of five thousand dollars cash, with the consent of Al Cicchini, Rocco Ferrera and Eugene Brady, induced by false representation. The alleged false representations set forth in the Bill of Particulars furnished by the Prosecuting Attorney upon request of the defendant and allowed by the court were: That the defendant, Frank Cickelli, represented to Rocco Ferrera, Al Cicchini, and Eugene Brady that he, the defendant, represented the Mayor of the City of Warren, Ohio, Walter Pestrack, at prior meetings between them and the defendant; that the promises given by Raymond Little and the defendant were that the Mayor and the Council of the City of Warren, Ohio, would enter into said contract and see that it was awarded after the money was paid; that the payment on August 22, 1961, was made by Rocco Ferrera and the payment on August 27, 1961, was made by Al Cicchini.

The following excerpts of the testimony of the witness, Brady, relating to count No. 4 are:—

"Q. This thirty-five thousand dollars that was to be paid to Frank Cickelli and Ray Little, so what was that to be paid for? A. It was paid to get the councilmen to pass the financing of the project.

"Q. At the time of this meeting the financing legislation had not been passed, is that correct? A. That's right.

"Q. Was there any further acts required by the Mayor? A. Why he had to sign the contract.

"Q. Who was to receive the money for the illegal extras, if it was indicated, if it was said in that meeting? A. Well pay Ray Little and Frank Cickelli."

The witness, Rocco Ferrera, testified as follows:—

"Q. Did Mr. Cickelli ever state he represented any person or persons in this transaction?

"By Mr. Spain: Objection.

"Court: He may answer.

"A. Mr. Sickelli stated that he represented the Mayor."

The testimony of Walter Pestrack, Mayor of the City of Warren at the time of the transaction, is as follows:—

"Q. Did you at any time authorize Frank Cickelli to represent you in dealing with the Boam-Ferrera Company? A. No, sir."

It is also in the evidence that the sum of $10,000.00 was paid by Rocco Ferrera and Al Cicchini to Paul Lamonge, the person designated by the defendant to receive the money. Thus the record contains evidence tending to prove all the essential elements of the offenses charged in the fourth count of the indictment. It was the province of the jury to determine the credibility of the witnesses and the guilt or innocence of the defendant. A reviewing court may not substitute its judgment for that of the jury and when a verdict is supported by substantial credible proof, such verdict will not be disturbed.

For the third assignment of error the defendant claims the court erred in its charge to the jury in that the instructions are given on aiding and abetting and the element of intent are not adequate or complete and that the court failed to give any instruction on motive or lack of motive. These alleged errors, if any, are errors of omission and not commission. The court's instructions must be considered as a whole and not by words, phrases and clauses taken out of context. We have carefully examined the charge of the court and find no error of any consequence, especially in

the absence of any request for further instructions on any phase of the case, when counsel both for the State and the defendant were given an opportunity by the court to make such requests. See State v. Tudor, 154 Ohio St. 249. Motive is not an essential element of either offense of which the defendant was found guilty. The third assignment is overruled.

Under the fourth assignment of error defendant claims the court erred in the introduction of evidence by the State of conversations between witnesses for the State and one Paul Lamonge when there had been no proof of a conspiracy between the defendant and the said Paul Lamonge. Without attempting to discuss the evidence at length, suffice it to say the record contains ample proof that Lamonge played an active role, in conjunction with the defendant, in the furtherance of the common purpose and design to receive illegal benefits on the sewer improvement project. In fact, the record shows that Lamonge was designated by the defendant to receive the illegal payments, did receive the sum of ten thousand dollars from the contractors, that his conduct was so crude, bold and despicable in his demands upon the contractors that Eugene Brady and Al Cicchini, superintendents of construction, ceased operations, shut the job down and fled for their lives.

The rule that before evidence of acts or declarations of co-conspirators are admissible against an accused, at least a prima facie case of conspiracy must be established, is not without qualifications. 10 Ohio Jurisprduence (2d) 78, Section 25 reads: "If the evidence of declarations is first admitted, and it is afterwards made to appear from the whole case that a conspiracy existed, the mistake in admitting the evidence before proof of conspiracy is

immaterial and not prejudicial". This assignment is overruled.

For his fifth assignment of error the defendant claims the court erred in continuing his charge to the jury, contrary to an agreement between court and counsel. The record shows that the court delivered the most of his charge to the jury late in the evening but adjourned court without completing the instructions; that the next morning the court continued with the instructions and submitted the case to the jury. Here again, the record in this case does not show there was an agreement between the court and counsel in regard to this matter. When this complaint was called to the court's attention, the Judge said, "There was no agreement, I merely explained to the attorneys that I did not want to send the jury out so late in the afternoon". This assignment is without merit and is overruled.

For his sixth assignment of error the defendant complains that after two conferences between counsel and the court, the court excused counsel for the defense from his chambers and continued the conference with counsel for the State; that defense counsel were never advised about what transpired in their absence. This assignment of error clearly points out how sensitive and suspicious litigants and lawyers become in a heated trial of a lawsuit. All parties concerned should avoid even the appearance of evil during a trial, but in the absence of any affirmative showing that the defendant was prejudiced in any way by what transpired, we must assume proper motives on the part of the court. The matter complained of occurred in the absence of the jury and, so far as the record shows, was never brought to the jury's attention. This assignment is overruled.

Under the seventh assignment of error the defendant claims his constitutional rights were violated when he was indicted on two counts arising out of the same transaction: that defendant may not be put twice in jeopardy for the same offense; that the court erred in sentencing the defendant on more than one count in the indictment.

The defendant relies upon the rule announced in the case of State v. Green, 89 Ohio App. 241, which holds:—

> "An indictment may contain two or more counts charging accused with the commission of two or more offenses, but upon trial the accused can not be found guilty and sentenced on more than one of the counts if it appears that the offenses charged in such indictment were predicated upon the same transaction and are related to the same subject matter."

As we view the record this rule does not apply to the instant case for the reason the record shows two different transactions. In the first count of the indictment the defendant was charged and found guilty of aiding and abetting Raymond Little, a city councilman, to solicit a bribe from the contractors in violation of Section 2917.01, Revised Code. The evidence adduced by the State to prove the essential elements of this alleged offense centered mostly on what occurred at the meeting on May 7, 1961, in defendant's home tending to prove that Raymond Little, an elected city councilman, did, in fact, solicit a bribe and that the defendant aided and abetted Little in so doing.

The evidence relied upon by the State to establish the guilt of the defendant under the fourth count in the indictment relates to an entirely different and later transaction and involves different persons. On August 21st and August 27th, 1961, the dates of these alleged offenses in the fourth count of the indictment, Raymond Little had been cast aside

and Paul Lamonge had been designated by the defendant to receive the money from the contractors upon false representation that the defendant represented the Mayor of the City of Warren, in violation of Section 2907.21, Revised Code. This statute defines an entirely separate and distinct crime from that charged in the first count. Conviction under this statute rests entirely upon different evidence. An Acquittal of either the first or fourth count of the indictment would not be a bar in a prosecution of the other. This is the common test to determine whether the rule of twice in jeopardy has been violated. 15 Ohio Jurisprudence (2d) 469, Section 294; State v. Johnson 112 Ohio App. 124; State v. Martin, 154 Ohio St. 539. The seventh assignment of error is overruled.

We have carefully examined this entire record and have fully considered all of the assignments of error and find no error of sufficient consequence to require a reversal of the judgment. The case, in our opinion, was very well tried by both the court and the attorneys representing the State and the defendant. The judgment must be and hereby is affirmed.

Radcliff, J. J., Concurs.
Brown, J., Concurs.

APPROVED:

s/ James Collier,
Judge.

THE SUPREME COURT OF THE STATE OF OHIO

Appeal from the Court of Appeals for Trumbull County

STATE OF OHIO,
Plaintiff-Appellee,

vs.

FRANK CICKELLI,
Defendant-Appellant.

This cause, here on appeal as of right from the Court of Appeals for Trumbull County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the plaintiff appellee recover from the defendant appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Trumbull County for entry.

I, John W. McMillan, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

THE SUPREME COURT OF THE STATE OF OHIO

Motion For Leave to Appeal From the Court of Appeals for Trumbull County

STATE OF OHIO,
Plaintiff-Appellee.

vs.

FRANK CICKELLI,
Defendant-Appellant.

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20,000, paid by Spain and Spain.

I John W. McMillan, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

THE SUPREME COURT OF THE STATE OF OHIO

REHEARING

STATE OF OHIO,
Plaintiff-Appellee,

vs.

FRANK CICKELLI,
Defendant-Appellant.

It is ordered by the Court that rehearing in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 46 Page ....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 13th day of January 1964.

Thomas L. Startzman,
Clerk.
By Norman L. Myers,
Deputy.

APPENDIX "C"

IN THE COMMON PLEAS COURT OF TRUMBULL COUNTY, OHIO

MOTION

STATE OF OHIO,

Plaintiff,

vs.

FRANK A. CICKELLI,

Defendant.

Now comes the defendant, and moves the court to dismiss the indictment presently pending against the defendant in this court.

/s/ JOSEPH M. SAKER,
Attorney for Defendant.

MEMORANDUM

It is well settled in the law that an indictment presented by a Grand Jury drawn from an illegally or unlawfully constituted array of jurors is of no effect and shall be held null and void. That the Grand Jury of the September term, 1961, of the Trumbull County Common Pleas Court was illegally and unlawfully constituted is undoubtedly true, verified by the fact that this court itself sustained such a motion made in Trumbull County Common Pleas Court Case No. 11628.

By this express admission this court has consented to and agrees with the proposition that the said array was illegally and unlawfully constituted and that, therefore, any and all indictments presented by the said Grand Jury, especially the indictment or indictments presently pending against this defendant are unlawful and should be dismissed.

/s/ JOSEPH M. SAKER,
Attorney for Defendant.

APPENDIX "D"

IN THE COURT OF COMMON PLEAS

MOTION FOR A NEW TRIAL

STATE OF OHIO,

Plaintiff,

vs.

FRANK A. CICKELLI,

Defendant.

Now comes the Defendant, Frank A. Cickelli, a verdict of conviction having been rendered herein on Counts No. 1 and No. 4 of the amended indictment, and within three days after such verdict, makes this, his written application to the Court that the verdict heretofore rendered be set aside, vacated and held for naught, and that he be granted a new trial herein, for the following causes, each of which materially affects his substantial rights:

1. Error of the Court in overruling Defendant's Motion for a change of venue.

2. Error of the Court in overruling Defendant's Motion to dismiss the indictments returned against the Defendant by the September Term of the Trumbull County Grand Jury for the reason that the panel of persons drawn to serve as Grand Jurors was not selected according to law and was improperly drawn.

3. That the verdict of the Jury is contrary to law.

4. That the verdict of the Jury is against the manifest weight of the evidence.

5. Error of the Court in conducting secret conferences with the Prosecuting Attorney and his assistants at two separate times during the course of the trial, both of which have been noted in the record. Both of these conferences involved important evidentiary matters. In each instance, the Court excused counsel for the defense from his chambers and held conferences running from fifteen to twenty minutes with the said Prosecuting Attorney and his assistants. In each instance, he returned to the bench with his robes and refused comment to counsel for the defense as to what had transpired between him and the Prosecutors. The evidentiary matters consisted of the Prosecutor's presentation of testimony tantamount to laying the foundation on the charge of conspiracy and further, on the question involving the misrepresentations as charged in Count No. 4, all of which was objected to by the Defendant.

6. Error of the Court in permitting the introduction by the State, over objection of Defendant, evidence of conversations between witnesses and third parties at which Defendant was not present, when no proper foundation had been laid and there was no proof of conspiracy, all of which the Court should have stricken from the record and Jury been instructed to disregard.

7. Error of the Court in failing to fulfill an agreement between counsel for the State and counsel for the Defendant whereby the Court agreed with all parties that he would charge the Jury on Friday, January 19, 1962, on all questions of law involved in this case and that at the resumption of the trial on Saturday morning, January 20, 1962, he would only complete his charge on the perfunctory rules of the Jury's conduct in the Jury Room, such as the selection of a foreman or forewoman and their responsibility to deliberate among themselves before arriving at a verdict. Contrary to his agreement with counsel and in gross abuse

of his discretion (and in complete surprise to counsel for both the State and the Defendant) he took the bench on Saturday morning, January 20, 1962, at 9:00 A.M. and opened Court by charging the Jury on extortion and malice, both of which were important elements in the multiple counts of the amended indictment rendered against this Defendant.

8. That the Court erred in its charge to the Jury.

9. Error of the Court in charging the Jury on Count No. 4 of the amended indictment. Therein, the Court failed to charge the Jury on the question of conspiracy but did charge the Jury on evidentiary matters of misrepresentation by reading into the charge an element which does not appear in the amended indictment in Count No. 4, to-wit: "that if you find Frank Cickelli falsely represented that he represented the Mayor, then you must find him guilty of this count." all of which was not only confusing to the Jury, but was also confusing to counsel and was tantamount to a request by the Court to the Jury to find the Defendant guilty of said count.

In response to said charge, the Jury found the Defendant guilty on Count No. 4, which was against the manifest weight of the evidence in the following respects: The facts as disclosed by the undisputed evidence, was that the contract for Phases B and C of the Warren Sewer Project was entered into on or before May 21, 1961. The thing of value, to-wit: two payments of $5,000.00 each, were allegedly paid in late August, 1961. It is manifestly impossible for it to be said that the alleged false and fraudulent representations were made for the purpose of inducing the payment of the money when, in fact, the contract for which the contractors were allegedly paying, was already held by them and work had commenced.

10. Misconduct on the part of the Prosecuting Attorney and error of the Court in permitting the Prosecutor, over the objection of the Defendant, to cross-examine the defense witness, Martin O'Connell, on immaterial matters not involved in the multiple counts of the amended indictment.

11. The Court erred in the admission of testimony offered by the State, over the objection of the Defendant.

12. Other errors of law occurring at the trial of Defendant and apparent on the face of the record which prevented Defendant from having a fair and impartial trial.

All of said errors being prejudicial to the Defendant and were duly objected to by Defendant.

An oral hearing on the foregoing Motion is hereby requested.

Respectfully submitted,

/s/ JOSEPH M. SAKER,
Attorney for Defendant.
/s/ JOHN R. SPAIN,
Attorney for Defendant.
/s/ GEORGE BUCHWALTER,
Attorney for Defendant.
/s/ W. LEO KEATING,
Attorney for Defendant.

This is to certify that a copy of the foregoing Motion has been served upon Lynn B. Griffith, Jr., Prosecutor for the County of Trumbull, State of Ohio, this 24th day of January, 1962.

/s/ JOSEPH M. SAKER

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 791.

STATE OF OHIO,
Appellee,

vs.

FRANK CICKELLI,
Appellant.

MOTION TO DISMISS
and
BRIEF IN SUPPORT OF MOTION.

LYNN B. GRIFFITH, JR.,
Prosecuting Attorney of Trumbull County, Ohio,
Court House, Warren, Ohio,
Counsel for Appellee.

JAMES F. BELL,
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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 791.

STATE OF OHIO,
Appellee,

vs.

FRANK CICKELLI,
Appellant.

MOTION TO DISMISS.

Now comes the Plaintiff-Appellee, State of Ohio, and respectfully moves this Court to dismiss the appeal of the Defendant-Appellant, Frank Cickelli, for the reason that the judgment appealed from does not present a substantial federal question.

I. QUESTIONS PRESENTED.

Three questions presented by this appeal are as follows:

(A) Was Appellant deprived of his rights under the Fourteenth Amendment to the Constitution of the United States, by a claimed irregularity in the selection of the grand jury, when he failed to raise this issue in accordance with the applicable statutes and laws of the State of Ohio, and when the record of the case is void of any evidence of the alleged irregularity in the selection of the grand jury?

(B) Was the Appellant twice placed in jeopardy for a single offense, contrary to the Fifth Amendment of the

Constitution of the United States, where the two offenses involved were violations of two separate and distinct Ohio statutes, where the legal elements of the two offenses are different; where the evidence offered to support each offense would have been insufficient to warrant a conviction of the other, and where the conviction or acquittal of one of these offenses could not have been pleaded in bar to a prosecution for the other?

(C) Was the Appellant deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States, when the trial court began its charge to the jury in the afternoon of one day and concluded the same on the following morning?

Respectfully submitted,

LYNN B. GRIFFITH, JR.,

Prosecuting Attorney in and for
Trumbull County, Ohio,

Attorney for Plaintiff-Appellee,
State of Ohio.

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 791.

STATE OF OHIO,
Appellee,

vs.

FRANK CICKELLI,
Appellant.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

I.

JUDGMENT APPEALED FROM DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

(a) **Selection of the Grand Jury.** This Court has "consistently held that there is no federal constitutional impediment to dispensing entirely with the Grand Jury in State prosecutions."[1] *Due process of law* as used in the Fourteenth Amendment is concerned with the basic fairness of procedure on the trial of the ultimate issue of guilt or innocence in a criminal case and not with the particular accusatory method by which such issue is joined in State Courts. If there be any exception to this general rule, it lies in the area of those cases in which the record of a criminal case discloses a systematic exclusion by law or practice of members of a particular race to which a defendant belongs. *E.g.*, *Reece v. Georgia*, 350 U. S. 85, 100 L.

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[1] *Beck v. Washington*, 369 U. S. 541, 8 L. ed. 2d 98, 82 S. Ct. 955; *Ocampo v. United States*, 234 U. S. 91, 58 L. ed. 1231, 34 S. Ct. 712 (1914); *Lem Woon v. Oregon*, 229 U. S. 586, 57 L. ed. 1340, 33 S. Ct. 783 (1913).

Ed. 77. The concern of the court in *Reece* and similar cases has been the denial of defendant's right to equal protection of the laws, and the violation of the basic concept of fairness involved in the due process clause. The line of cases represented by Reece has never indicated that the particular technicalities of procedure adopted by a state in impaneling a grand jury should be elevated to the status of a constitutional question. It may be observed in this regard that the alleged irregularities, as set out in the statutory sections cited in Appellant's brief, are largely technical in nature, and any possible violation of these statutes would not lead to impaneling of a grand jury which was either biased or which lacked the requisite qualifications to act as jurors. Nor is there any claim by the defendant that such bias or lack of qualifications was present in this case.

Even if constitutional protections afforded to the defendant extend to compliance with the technicalities in the manner of selection of a grand jury, it is clear that such rights must be asserted in accordance with the procedural rules of the State courts, unless these rules themselves violate some provision of the Federal Constitution. The record of this case clearly shows that the petitioner did not comply with the laws of Ohio in the manner of raising an objection of irregularities in the impaneling of the grand jury. Ohio Revised Code Section 2313.41 provides:

> "*A challenge of the array may be made* and the whole array set aside by the court *when the jury, grand or petit, was not selected*, drawn or summoned, or when the officer who executed the venire did not proceed as *prescribed by law*. No challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror; but on challenge, a juror may be set aside by reason of a misnomer in

his name; *but such challenge shall only be made before the jury is impaneled and sworn*, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer, if the jurors who formed the same possessed the requisite qualifications to act as jurors."

There is no question as to the qualifications of the grand jurors that indicted this defendant. No challenge to the array of this panel of grand jurors was made. The Ohio code is very specific in stating, "no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors."

Ohio Jurisprudence 2d discusses this matter in two places and states as follows:

15 *O. J.* 2d, 196:

"The lack of legal qualifications of grand jurors may be taken advantage of by a plea in abatement. But mere irregularities in selecting and drawing grand jurors which do not relate to or affect their personal qualifications as such, must be taken advantage of, if at all, by challenge for cause, and not by a plea in abatement."

26 *O. J.* 2d, 286:

"Technical defects and irregularities in the selecting, summoning and impaneling of a grand jury must, by express statutory provisions, be availed of, if at all, by challenge before the grand jury is impaneled and sworn."

A leading authority is the case of *State of Ohio v. Huling*, 17 O. S. 588, wherein the Court stated:

"Whether the latter kind of objection (objection to mere irregularities in the manner of selecting of grand jurors) can be taken by plea to the indictment, is a question upon which there has been much difference

of opinion and contrariety of decision. Since the decision of the case of *Doyle v. the State*, 17 Ohio 222 it has been settled law in Ohio that such a plea is good in all cases where the objection is to the qualification or competency of the individual jurors. This is as far as we have gone. We have never held and such is not the practice so far as we know, that mere objections to the *manner* of selecting and constituting the jury can be taken by plea in abatement. On the contrary, the practice is to require the objection to be taken by challenge for cause, either to the panel or to individual jurors."

In the case of *The State of Ohio v. Blaney*, 17 O. C. C. 486 exception was taken to the indictment, first by a motion to quash, and then by a plea in abatement which alleged defects and irregularities in selecting, drawing, summoning and impaneling the grand jury. The Court held:

"None of these things are of essence, and it is believed, unless they are, they cannot properly be made the basis of a motion to quash the indictment, or of a plea in abatement, but must, by express statutory provision, be availed of, if at all, by challenge before the jury is impaneled and sworn." (Sec. 5175 R. S. cited.)

A close reading of Section 5175 of the Revised Statutes discloses that it is with the exception of two or three minor words identical with Ohio Revised Code Section 2313.41. This rule was followed in the cases of *State v. Lindsey*, 4 O. C. C. N. S. 409, *State v. Dieter*, 81 O. S. 505, *State v. Lynch*, 5 O. S. 16 and *State v. Easter*, 30 O. S. 542.

In *State v. Roth*, 3 O. C. C. 59 on page 63 it is stated:

"In some of the States, challenge seems to be the only form in making the objection even where it goes to the personal disqualification of the jurors. The better opinion however is and the current of authority is to the effect that irregularities in selecting and im-

> paneling grand juries which do not go to their incompetency can be only objected to by way of challenge but that their individual incompetency may be pleaded in abatement to the indictment."

This is, and has been the law of Ohio since 1848. The defendant in this case having failed to challenge the array as prescribed by statute and thereby obtain a new panel cannot now complain after conviction, of any alleged irregularities.

Even if it be conceded, which Appellee emphatically does not, that the defendant had no opportunity for a challenge to the array because he was not informed by arrest or otherwise, that charges against him would be considered by the grand jury, and that such lack of opportunity for challenge to the array permitted him to raise the issue in another manner, the law of Ohio provides that if alleged irregularities in the selection of a grand jury may be objected to other than by challenge to the array it must be done by a plea in abatement.

Ohio Revised Code Section 2941.55 provides:

> "Plea in abatement may be made where there is a defect in the record shown by facts extrinsic thereto."

The rule is set out in 15 *O. J.* 2d 402 as follows:

> "The lack of legal qualifications of grand juries may be taken advantage of by a plea in abatement."

It appears that if defendant had an alternate method available to him of objecting to these alleged irregularities, it is by plea in abatement.

Ohio Revised Code Section 2941.59 provides:

> "The accused waives all defects which may be excepted to by a motion to quash or a plea in abatement by demurring to an indictment, or by pleading in bar or the general issue."

In *State of Ohio v. Detterline*, 15 O. N. P., N. S. 433, it was held:

> "A plea of abatement must be made prior to the plea of not guilty, and where it is discovered during the taking of testimony that the prosecuting witnesses have been incorrectly named in the indictment it is too late to interpose a plea of abatement."

In this case the defendant entered his plea of not guilty on October 17, 1961, with leave until October 20, 1961 to file motions. It was not until January 31, 1962 that his motion, which is difficult to define, was filed. Having entered his not guilty plea, defendant, by reason of O. R. C. 2941.59 waived any objection to the impaneling of the grand jury.

It is contended, in defendant's brief, that the motion to dismiss the indictment was timely made because there was an amendment to the indictment after he had entered a plea of not guilty. It is apparently defendant's contention that a new arraignment was required by this amendment and that therefore his motion to dismiss was timely made within the meaning of O. R. C. 2941.59 cited above.

As noted in the defendant's statement of the case, subsequent to the arraignment of the defendant and prior to trial, the trial court permitted the State to amend the indictment so as to conform with a bill of particulars requested by the defendant. Such amendment is permitted in Ohio by statute.[1] It may be noted that this statute permits the amendment of the indictment even after the trial, so that there is obviously no resubmission to the grand jury or rearraignment contemplated when an indictment is amended.

It must be emphasized that this amendment did not in any way change the identity of the crimes charged.

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[1] O. R. C. Section 2941.30.

With respect to the amendments involving crimes of which the defendant was convicted, the crimes remained the same, both before and after the amendment, i.e., bribery and obtaining money by false pretenses.

The defendant at no time, by motion or otherwise, objected to the amendment, asked that the words be stricken or make any complaint whatsoever with regard to this proceeding.

Since no rearraignment of the defendant was required either by the general law of the state or by the particular circumstances of the amendment, it is clear that the defendant's motion to dismiss was made after the arraignment and was therefore not timely. Though the defendant does not set forth in his jurisdictional statement under the heading of Questions Presented, the issue of the due process clause requiring the entry of a plea before a trial can proceed, he seeks to interject this issue in his argument. Appellee submits that for the reasons cited above no new plea was required to the amended indictment. In any event is is clear that the defendant is not now entitled to raise this issue for the reason that the same was not raised in the state courts. This fact of course precludes a consideration of this question at this time under Rule 15d which requires an appeal from a state court to set out in a statement of case a stage of the proceedings in the court of first instance and the appellate court and the manner in which the federal questions sought to be reviewed were raised, the methods of raising and the way in which they were passed upon by the court. Defendant's brief is void of any statement as to the time and manner of raising in the state courts the issue of pleading to an amended indictment.

If this issue were not disposed of by the foregoing, the record of this case contains no evidence of the alleged

irregularities in the selection of the grand jury. No evidence was presented in support of defendant's motion to dismiss the indictment for improper selection of the grand jury. There is nothing in the record to pass upon in this regard. Petitioner has attempted to incorporate by reference in his briefs in the Ohio courts and in this Court, matters raised in another case. Petitioner states in his brief that a motion was sustained in the unreported case of *State of Ohio v. Little* to the array of the petit jury. There is no opinion delivered in that case and certainly no finding of violations of all the statutes cited by the petitioner.

It is respectfully submitted that evidence of irregularities, if there were any, must appear in the record of this case if error is to be urged. This Court has held that even allegations of race discrimination in the selection of a grand jury must be supported by evidence in the record before it could pass upon the constitutional questions involved.[1]

(b) **Double Jeopardy.** Defendant was convicted of the violation of two Ohio statutes, 1. O. R. C. 2917.01, which defines the crime of bribery and proscribes the solicitation or acceptance of various public officers of things of value to influence official duties, and 2. O. R. C. 2907.21, which prohibits the obtaining of money by false pretenses. Defendant contends that his conviction on these two counts constituted double jeopardy in violation of the Fifth Amendment of the Constitution of the United States. Full understanding of this question requires a brief statement of fact. On May 7, 1961, one Raymond Little, a city councilman, aided and abetted by the defendant, solicited

[1] *Martin v. Texas*, 200 U. S. 316, 50 L. Ed. 497.

money from contractors who were to perform work in the City of Warren. The figure finally agreed upon was $35,000.00. This money was to be paid to the councilman and the defendant together, for two purposes. First, it was to influence the official action of the councilmen in voting on legislation involved in the letting of the contract in which the contractors were interested. Second, it was intended to influence the mayor and the executive branch of the city administration in their activities in relation to the contract.

The efficacy of paying money to the councilman was apparent and stemmed from his official position as one voting on legislation with respect to the contract. The payment to the defendant was based on the representations of the defendant that he was a representative of the mayor; representations which were false according to evidence presented at the trial. More than one hundred days after this solicitation, $10,000 was paid to one Paul Lamonge, a co-conspirator of the defendant. Nothing was paid to Councilman Little, nor were there remaining any official actions to be accomplished by city council with respect to the letting of the contract, though with the job under way there were still favors to be obtained from the city administration in its supervisory capacity with respect to the work.

With this brief outline of facts in mind, we may turn to the legal questions involved in the issue of double jeopardy. With respect to the violation of O. R. C. 2917.01, the bribery statute, it may be noted that defendant was not one of the officers listed in this statute, nor did he have any official duties which were intended to be influenced or which could have been influenced by the payment of this money nor did his co-conspirator, Paul Lamonge, who physically received the money, hold any such position.

The payment of the $10,000 to Lamonge could not, therefore, have constituted a bribe, since the recipients, Lamonge and Cickelli, had no official capacity in connection with the Warren Sewer Project. This was not money solicited by a public officer for the purpose of influencing official action, but rather money obtained by the false pretense of the defendant that he represented the mayor. On the other hand, it is to be noted that the solicitation which took place earlier by Councilman Little, which was aided and abetted by the defendant, did constitute the solicitation of a bribe because the money, or Little's share of it, was to be paid for the purpose of influencing an official action as a councilman of the City of Warren, contrary to the bribery statutes.

The true test of whether or not these convictions constitute double jeopardy is whether or not the conviction or acquittal of one of these offenses could have been pleaded in bar to a prosecution for the other. The test commonly applied is whether the evidence necessary to support the second offense would have been sufficient to warrant a conviction on the first. The state's evidence on the first count which was to the effect that the defendant aided Raymond Little in soliciting a bribe from the contractors to influence his vote on pending legislation. Such evidence would clearly not have supported a verdict nor even constituted a prima facie case with respect to a charge that the defendant had obtained money through a co-conspirator by means of false representations that he represented the mayor of the City of Warren. Even regarding single acts, the rule is clear that a single act may be an offense against two statutes, and if either statute requires proof of an additional fact an acquittal of the offense requiring proof of the additional fact does not exempt the defendant from prosecution and punishment under the statute which does

not require proof of such additional fact.[1] In the instant case, conviction on the first count required a showing of the official capacity of Mr. Little, the existence of future official action of his to be influenced and the request and solicitation of the money. None of these facts would be necessary to prove the state's case on the count of obtaining money by false pretenses. Conversely with respect to the fourth count, the state's case required proof of receipt of the money, the conspiracy between Lamonge and the defendant, the representations by the defendant that he represented the mayor, the effective operation of such representations in the minds of the contractors and the falsity of such representations. All of which facts were unnecessary to the state's case on the bribery count.

It has been consistently held that the double jeopardy prohibition of the Fifth Amendment to the Federal Constitution is not one of the fundamental protections required of the states by due process provisions of the Fourteenth Amendment, unless a particular kind of double jeopardy subjects the state defendant to a hardship so acute and shocking as to violate the concept of order liberty which lies at the base of our civil and political institutions.[2] Nothing in the due process clause of the Federal constitution prevents the state from construing the double jeopardy clause of its own state constitution to the effect that double jeopardy under a state constitution would not apply unless the same evidence necessary to sustain the second indictment would have been necessary to secure a conviction on the first.[3] The factual and legal

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[1] *Duval v. State*, 111 O. S. 657.

[2] *Johnson v. Rahy*, 266 Fed. 2d 230; *U. S. ex rel. Martin v. Walker*, 111 F. Supp. 455, aff. 203 Fed. 2d 563.

[3] *Hope v. State of New Jersey*, 356 U. S. 464, 2 L. ed. 2d 912.

differences involved in these two counts eliminate any question of double jeopardy.

(c) **Adjournment During the Charge and Re-Definition of Terms by the Court.** With respect to Appellant's complaint that the court's charge to the jury was interrupted by a daily adjournment, appellee knows of no authority for the proposition that such procedure is prohibited by state law, nor is any such authority cited by the defendant. This issue was heard and decided in this case by the Ohio Supreme Court, which apparently found that O. R. C. 2945.10, cited by the defendant, did not require a continuous charge. Certainly there is nothing inherently unfair, illegal or improper about adjourning court at an appropriate time during the day although such adjournment results in a division of the charge. In no event can the propriety of such procedure be considered to be raised to the level of a constitutional question under the due process clause of the Fourteenth Amendment.

Similarly, it is submitted that the practice of correction, re-definition and clarification of the charge with due respect to certain elements of the crime, present no federal question arising under the constitution.

Defendant does not indicate in what way he may have been prejudiced by the practice complained of, except to hint that confining the second day's charge to the elements of the crime resulted in an emphasis of that aspect of the charge. This reasoning seems to be based on the premise that a description of the elements of the crime is a benefit to the prosecution and deleterious to the defense. It might just as easily be argued that the converse would be true, since the precise definition of the elements necessary to be found to support a finding of guilty emphasizes the necessity for the prosecution to carry its

burden of proof in several particular areas, rather than by any general impression of guilt. It may be further noted that the defendant made no request for a repetition of instructions of the previous day, for example with respect to the presumption of innocence or reasonable doubt, the omission of which he now complains.

CONCLUSION.

It is is respectfully submitted that this appeal is subject to a motion to dismiss. It does not present a substantial Federal Question.

Respectfully submitted,

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Attorney for Plaintiff-Appellee, State of Ohio.

APPENDIX I.

STATUTES.

O. R. C. 2313.41—Array may be set aside.

A challenge to the array may be made and the whole array set aside by the court when the jury, grand or petit, was not selected, drawn, or summoned, or when the officer who executed the venire did not proceed as prescribed by law. No challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror; but on challenge, a juror may be set aside by reason of a misnomer in his name; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors.

O. R. C. 2907.21—Larceny by Trick.

No person shall obtain possession of, or title to, anything of value with the consent of the person from whom he obtained it, provided he induced such consent by false or fraudulent representation, pretense, token, or writing.

Whoever violates this section is guilty of larceny by trick, and, if the value of the thing so obtained is sixty dollars or more, shall be imprisoned not less than one nor more than seven years. If the value is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both.

O. R. C. 2917.01—Bribery.

No person shall corruptly give, promise, or offer to a member or officer of the general assembly or to a state, judicial, or other officer, public trustee, or an agent or

employee of the state or of such officer or trustee, either before or after his election, qualification, appointment, or employment, any valuable thing, or corruptly offer or promise to do any act beneficial to such person to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him. No member of the general assembly, or a state officer or other officer, public trustee, agent, or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, shall solicit or accept any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him.

Whoever violates this section shall be imprisoned not less than one nor more than ten years.

A person convicted under this section is disqualified from holding any public office or appointment under this state, and, if not a state officer, shall be removed from office or employment by order of the court.

O. R. C. 2941.30—Amending an indictment.

The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment or information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impaneled, and to a reasonable continuance of the cause, unless it clearly

appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted.

O. R. C. 2945.10—Order of proceedings of trial.

The trial of an issue upon an indictment or information shall proceed before the trial court or jury as follows:

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(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or other charge or instruction provided for in this section, when so written and given, shall not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

The court may deviate from the order of proceedings listed in this section.

O. R. C. 2941.55—Plea in abatement.

Plea in abatement may be made when there is a defect in the record shown by facts extrinsic thereto.

O. R. C. 2941.59—Waiver of defects.

The accused waives all defects which may be excepted to by a motion to quash or a plea in abatement, by demurring to an indictment, or by pleading in bar or the general issue.

APPENDIX II.

APPELLANT'S ASSIGNMENT OF ERRORS IN THE SUPREME COURT OF OHIO.

1. Defendant was deprived of his rights under the Constitution of the State of Ohio and the Constitution of the United States of America by the Court's overruling Defendant's motion to dismiss the indictment against Defendant for the reason that the panel of persons drawn to serve as Grand Jurors was not selected according to law and was improperly drawn.

2. The Court of Appeals, in reviewing the case upon the weight of the evidence, did not determine whether the verdict was supported by the degree of proof required in criminal cases.

3. The verdict of the jury is contrary to law and against the manifest weight of the evidence.

4. The Court erred in its charge to the jury.

5. The Court erred in permitting the introduction by the State of evidence of conversation between witnesses and third parties at which Defendant was not present, when no proper foundation had been laid and there was no proof of conspiracy.

6. Error of the Court in continuing his charge to the jury, contrary to prior agreement between counsel and the Court.

7. The indictment of Defendant on two counts arising out of the same subject matter or same transaction is a violation of Defendant's right under the Constitution of the State of Ohio and the Constitution of the United States of America, not to be twice put in jeopardy for the same offense and the Court erred in sentencing Defendant on more than one Count in the indictment.